To be argued
By: BEEZLY J. KIERNAN
15 minutes requested

Supreme Court of the State of New York
Appellate Division – Second Department

No. 2024-11753

ORAL CLARKE, ROMANCE REED, GRACE PEREZ, PETER RAMON, ERNEST TIRADO, and DOROTHY FLOURNOY,

Plaintiffs-Appellants,

v.

TOWN OF NEWBURGH and TOWN BOARD OF THE TOWN OF NEWBURGH,

Defendants-Respondents,

LETITIA JAMES, Attorney General of the State of New York,

Intervenor.

REPLY BRIEF FOR INTERVENOR ATTORNEY GENERAL

BARBARA D. UNDERWOOD
Solicitor General
JUDITH VALE
Deputy Solicitor General
ANDREA TRENTO
BEEZLY KIERNAN
Assistant Solicitors General
SANDRA PARK
Bureau Chief, Civil Rights
LINDSAY MCKENZIE
Section Chief, Voting Rights
DEREK BORCHARDT
Assistant Attorney General of Counsel

LETITIA JAMES
Attorney General
State of New York
The Capitol
Albany, New York 12224
(518) 776-2023
Beezly.Kiernan@ag.ny.gov

Dated: December 9, 2024

Supreme Court, Orange County – Index No. EF002460-2024

TABLE OF CONTENTS

Page

Page

TABLE OF AUTHORITIES

Cases **Page(s)**

Cases **Page(s)**

Cases **Page(s)**

Cases **Page(s)**

Constitutions

Laws

New York

Federal

PRELIMINARY STATEMENT

As the Attorney General's opening brief explained, New York's John R. Lewis Voting Rights Act (NYVRA) comports with the Equal Protection Clauses of the federal and state Constitutions. The statute equally protects all voters from racially discriminatory vote dilution. And, as the Town of Newburgh concedes, the statute's remedies are facially race-neutral. Because not every conceivable application of the NYVRA requires political subdivisions like the Town to discriminate on the basis of race, the statute on its face is not subject to strict scrutiny. It is subject only to rational basis review, and the Town does not dispute that the statute satisfies that test.

The Town's counterarguments are meritless. The Town cites no case subjecting a race-neutral antidiscrimination statute like the NYVRA to strict scrutiny. Nor has any court applied strict scrutiny to Section 2 of the federal Voting Rights Act, on which the vote-dilution provision of the NYVRA is based. And if strict scrutiny applied to every government action aimed at reducing the racially discriminatory disparate impact of a law or policy—as the Town contends—then numerous long-standing antidiscrimination statutes would be in jeopardy of violating the

Constitution. Fortunately, that is not the law. The State, and the Town, may use race-neutral means to combat racially discriminatory vote dilution without being subject to strict scrutiny. Supreme Court erred in holding otherwise, and this Court should reverse.

ARGUMENT

POINT I

THE TOWN FAILS TO SHOW THAT IT HAS CAPACITY TO CHALLENGE THE NYVRA ON ITS FACE

As the Town acknowledges (at 14), municipalities generally lack capacity to challenge state legislation. *See Matter of World Trade Ctr. Lower Manhattan Disaster Site Litig.*, 30 N.Y.3d 377, 383 (2017); *City of New York v. State of New York*, 86 N.Y.2d 286, 290 (1995). And contrary to the Town's argument (at 15), this limitation on capacity applies to a municipality raising a constitutional challenge in a defensive posture. See Br. for Intervenor Attorney General (AG Br.) at 15-16; *In re World Trade Ctr. Lower Manhattan Disaster Site Litig.*, 892 F.3d 108, 112 (2d Cir. 2018). Thus, for the Town to have capacity here, it must demonstrate that it will be "held accountable" for violating the Equal Protection Clause by carrying out the specific conduct required by the NYVRA. *City*

of New York, 86 N.Y.2d at 295; *see also Blakeman v. James*, No. 2:24-cv-1655, 2024 WL 3201671, at *14 (E.D.N.Y. Apr. 4, 2024).

The Town's vague invocation of the equal protection rights of voters is plainly insufficient to satisfy that standard. The Town points to no specific remedy it would have to implement under the NYVRA that will violate the Equal Protection Clause. Nor is its challenge to the NYVRA based on any such remedy. The Town fails to explain, for example, how it could be held accountable to any of its voters for violating the Equal Protection Clause merely by adopting a district-based election system, as numerous other municipalities in the State have done. See AG Br. at 32. Moreover, the NYVRA makes available a broad menu of other options for potential remedies, such as implementing ranked-choice or cumulative voting systems. *See* Election Law § 17-206(5). The Town failed to explain how its implementation of even one of these remedies would violate the constitutional rights of its voters. That failure is fatal to the Town's capacity argument.

Contrary to the Town's suggestion (at 18), the Town did choose to raise a sweeping *facial* challenge to the vote-dilution provision of the NYVRA, before the trial court made any factual findings about whether

unlawful vote dilution has occurred or issued any remedy for such vote dilution. (*See* Mem. of Law in Support of Mot. for Summary Judgment at 10 (Sept. 25, 2024), NYSCEF Doc. No. 70.) Indeed, the basis of the Town's argument is that *any* change to a voting system that a political subdivision *might* have to make to comply with *any* finding of vote dilution under the NYVRA would violate the rights of the subdivision's voters. See Town's Br. at 16, 26, 30. And this is the ground on which Supreme Court struck down the statute on its face. (Decision & Order ("Order") at 16 (Nov. 7, 2024), NYSCEF Doc. No. 147.) The Town, as a political subdivision of the State, lacks capacity to assert such a broad facial challenge to the NYVRA, unconnected to any specific remedy the Town would have to implement in compliance with the statute.

As explained in the Attorney General's opening brief (at 19), the Town could bring an as-applied challenge to the NYVRA if, at a later point in the action, the Town were ordered to carry out a specific remedy to comply with the NYVRA that the Town plausibly alleges requires it to violate the equal protection rights of voters. Of course, affected voters could also challenge that remedy as violating their constitutional rights. For these reasons, the concerns raised by amicus curiae Town of Mount

Pleasant (at 26-27)—that capacity limitations prevent enforcement of the federal Constitution's Equal Protection Clause—are baseless. Capacity rules do not bar consideration of equal protection claims. They merely limit the circumstances in which a political subdivision of the State may challenge state legislation.

Here, limitations on the Town's capacity merely prevent it from bringing its broad, facial challenge to the vote-dilution provision of the NYVRA. Because the Town lacks capacity to assert that facial challenge, Supreme Court should not have struck down the statute on its face.

POINT II

THE NYVRA COMPORTS WITH THE EQUAL PROTECTION CLAUSES OF THE FEDERAL AND STATE CONSTITUTIONS

The Town fails to establish that the NYVRA is unconstitutional on its face. Because the Town has brought a facial challenge, it bears the extraordinary burden of establishing beyond any reasonable doubt that every conceivable application of the statute would violate the Constitution. *See White v. Cuomo*, 38 N.Y.3d 209, 216 (2022); *Matter of Moran Towing Corp. v. Urbach*, 99 N.Y.2d 443, 448 (2003). And because of the Town's limited capacity to challenge state legislation (see *supra*

Point I), the Town must establish that its compliance with the NYVRA would inevitably cause it to violate the equal protection rights of its voters. The Town falls far short of meeting this high burden. Accordingly, Supreme Court's decision below should be reversed.

A. The NYVRA Is Race-Neutral on Its Face.

As the Attorney General's opening brief explains (at 21-37), the NYVRA's vote-dilution provision does not require political subdivisions like the Town to impose any express racial classifications on their voters. To the contrary, the NYVRA equally protects members of *all* racial groups from racially discriminatory vote dilution and authorizes race-neutral means to remedy such discrimination. Thus, far from compelling political subdivisions to engage in invidious racial discrimination, the statute *prohibits* racial discrimination imposed by election systems and practices. Like many other race-neutral antidiscrimination laws, the NYVRA is not subject to strict scrutiny. None of the Town's contrary arguments has any merit.

1. The NYVRA protects all voters from vote dilution.

There is no merit to the Town's argument that the NYVRA's vote-dilution provision protects only non-white racial minorities and therefore imposes an express racial classification. See Town's Br. at 33-35. As explained in the Attorney General's opening brief (at 24), the NYVRA's protections against racially discriminatory vote dilution may be invoked equally by members of any race. This is clear from the statute's plain language, which defines "protected class" as a "class of individuals who are members of a race, color, or language-minority group, including individuals who are members of a minimum reporting category that has ever been officially recognized by the United States census bureau." Election Law § 17-204(5). This broad definition encompasses all racial groups.

The Town's contention that the NYVRA protects only "race . . . minority" groups (Town's Br. at 34) misleadingly distorts the definition of "protected class" by taking words out of context while excising nearly the entirety of the statutory definition. Indeed, the Town's selective quotation improperly breaks apart the word "language-minority group." In the statute's actual definition of "protected class," the term "minority"

is present only in the phrase "language-minority group," § 17-204(5), which is separately defined, *see id.* § 17-204(5-a). It would be implausible and grammatically incorrect to read "-minority" as also applying to a "race" or "color" group. Notably, another trial court recently rejected this interpretation in upholding the NYVRA against a facial equal protection challenge, *see Coads v. Nassau County*, Index No. 611872/2023, Slip Op. at 16 (Sup. Ct. Nassau County Dec. 6, 2024), NYSCEF Doc. No. 229. And appellate courts in California and Washington reached the same conclusion based on substantially identical language in their state voting rights acts, *Sanchez v. City of Modesto*, 145 Cal. App. 4th 660, 683-84 (2006), *cert. denied*, 552 U.S. 974 (2007); *Portugal v. Franklin County*, 1 Wash. 3d 629, 633-34 (2023), *cert. denied sub nom. Gimenez v. Franklin County*, 144 S. Ct. 1343 (2024).

Moreover, it is not absurd to interpret the NYVRA as protecting white voters from racially discriminatory vote dilution, as the Town contends (at 34). Racial discrimination against white voters is just as harmful as racial discrimination against non-white voters. And interpreting the NYVRA as protecting members of all racial groups would avoid the constitutional issue that would otherwise arise if the statute applied

only to certain racial groups. *See Matter of Lorie C.*, 49 N.Y.2d 161, 171 (1980) (laws should be interpreted to avoid constitutional questions). See *infra* Point II.C. Thus, it is reasonable to interpret the NYVRA as protecting all voters from the harmful effects of racially discriminatory vote dilution—just as many race-neutral antidiscrimination statutes protect all persons, regardless of their particular race.

There is also no basis for the Town's unsubstantiated speculation that the vote-dilution provision would be impossible to comply with if applied in a race-neutral manner. The Town's argument appears to be based on its supposition that vote dilution exists *whenever* a potential remedy would give a racial group "a greater opportunity to elect more candidates of their choice"—and thus could serve to increase the political power of voters who are members of a racial majority in the jurisdiction at issue. Town's Br. at 2; *see also id.* at 26. But the Town's characterization of the statute is mistaken. The NYVRA requires a court to impose a remedy only after vote dilution is proven, and a finding of vote dilution requires far more than merely showing that a remedy would enhance a racial group's voting power. In other words, while vote dilution may be established by members of any protected class, it is purely speculative to

suppose that members of racial majorities in jurisdictions throughout the State would be able to demonstrate vote dilution under the NYVRA, establish that an appropriate remedy exists, and exercise even greater political power as a result. Moreover, the Town's absurd-results argument is flatly contradicted by the experience of California and Washington, where protections against vote dilution have been construed to apply to all racial groups without any attendant absurd results.

2. The vote-dilution provision protects against racial discrimination.

Because the NYVRA equally protects all voters from racially discriminatory vote dilution, it is a paradigmatic race-neutral antidiscrimination statute. Such race-neutral antidiscrimination statutes have routinely been applied and upheld without being subject to strict scrutiny, as the Attorney General's opening brief explains (at 26).

The Town offers no meaningful response to these long-standing antidiscrimination statutes, instead merely denying that the NYVRA is an antidiscrimination statute. But the Town is plainly incorrect. The NYVRA is designed to remedy the racially discriminatory effects of vote dilution where a challenged electoral system or practice—like the at-

large system used for the Town's Board here—is found to cause such racially discriminatory vote dilution. In this respect, the NYVRA is similar to numerous race-neutral antidiscrimination statutes. In addition to prohibiting intentional discrimination, many such statutes also provide a remedy where a facially race-neutral system or practice—like the use of a test or other selection criteria in making employment or housing decisions—is found to cause racially discriminatory effects (often called "disparate impact liability").

Disparate impact claims under these antidiscrimination statutes do not require a showing of intentional discrimination. Nor does a plaintiff have to show that a challenged policy or practice expressly treats people differently based on race. Rather, a plaintiff must show that a policy or practice has a disproportionately adverse effect on members of a protected class. *See Texas Dept. of Hous. & Community Affairs v. Inclusive Communities Project, Inc.*, 576 U.S. 519, 524 (2015). For example, a plaintiff may be able to establish disparate-impact liability if an employer's test or other selection criteria unjustifiably prevents members of a protected class from an equal opportunity to be hired. *See People v. New York City Tr. Auth.*, 59 N.Y.2d 343, 348-49 (1983). At the

federal level, Title VII of the Civil Rights Act, the Fair Housing Act, and the Age Discrimination in Employment Act all allow such disparate impact claims. *See Texas Dept. of Hous. & Community Affairs*, 576 U.S. 519; *Smith v. City of Jackson*, 544 U.S. 228 (2005); *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971). In this State, both the New York State and City Human Rights Laws permit disparate impact claims. *See New York City Tr. Auth.*, 59 N.Y.2d at 348-49 ("[A]n employment practice neutral on its face and in terms of intent which has a disparate impact upon a protected class of persons violates the [State] Human Rights Law unless the employer can show justification for the practice in terms of employee performance."); *Levin v. Yeshiva Univ.*, 96 N.Y.2d 484, 489 (2001) (City Human Rights Law's disparate-impact provisions apply to "policies or practices which, though neutral on their face and neutral in intent, have an unjustified disparate impact upon one or more of the covered groups").[1]

---

[1] To the extent the Town suggests that the State lacks the power to pass legislation intended to remedy "practices that are discriminatory in effect, if not in intent" (Town's Br. at 23 (quoting *Tennessee v. Lane*, 541 U.S. 509, 520 (2004))), that argument is meritless. To be sure, the Fourteenth and Fifteenth Amendments grant Congress the power to enact prophylactic legislation. *See* U.S. Const. amend. XIV, § 5, amend.

(*continued on the next page*)

Similarly to these well-established, race-neutral antidiscrimination statutes, the NYVRA's vote-dilution prohibition addresses the racially discriminatory effects of facially neutral electoral systems or practices. The statute prohibits "any method of election, having *the effect* of impairing the ability of members of a protected class to elect candidates of their choice or influence the outcome of elections, as a result of vote dilution." Election Law § 17-206(2)(a) (emphasis added). In other words, if a method of election has a disproportionately adverse impact on a protected class in terms of its members' ability to participate in the political process, then plaintiffs may be able to establish liability for vote dilution. That does not mean members of a protected class are entitled to proportional representation. Just as employment-discrimination laws do not impose any quota requirements for hiring, the NYVRA does not

---

XV, § 2. But unlike Congress, States do not need a grant of authority from the federal Constitution to regulate. Instead, States have broad police powers to regulate within their respective jurisdictions, including the power to regulate their own elections, *see Shelby County v. Holder*, 570 U.S. 529, 543 (2013). And States have a compelling interest in eliminating discrimination. *See, e.g.*, *Roberts v. U.S. Jaycees*, 468 U.S. 609, 624 (1984). The NYVRA sits comfortably within the State's authority.

require that members of a protected class actually prevail in elections. Rather, the remedial provision of the NYVRA is designed to "ensure that voters of race, color, and language-minority groups have equitable *access* to fully participate in the electoral process." *Id.* § 17-206(5)(a).

A quintessential example of vote dilution can arise when at-large elections are used. When voting patterns are racially polarized, at-large elections dilute the voting power of the minority group (of whatever race) in the political subdivision. *See Shaw v. Reno*, 509 U.S. 630, 640-41 (1993); *Thornburg v. Gingles*, 478 U.S. 30, 47 (1986). That racially discriminatory effect can arise from the use of at-large electoral systems in particular because these systems "tend to minimize the voting strength of minority groups by permitting the political majority to elect *all* representatives of the district," whereas those groups "may be able to elect several representatives" in a different electoral system, such as a district-based method of election. *Rogers v. Lodge*, 458 U.S. 613, 616 (1982). In other words, when a politically cohesive minority group's electoral choices diverge from those of the rest of the electorate, at-large voting systems may have the effect of diluting the voting power of that minority group while simultaneously aggrandizing the voting power of

the majority group. *Gingles*, 478 U.S. at 48. That is why the NYVRA provides that where an at-large election system is used, vote dilution may be established by proving racially polarized voting conditions. Election Law § 17-206(2)(b)(i)(A).

And even when voting patterns are not racially polarized, there may be other circumstances under which at-large election systems have the racially discriminatory effect of impairing the ability of members of a protected class to elect candidates of their choice or influence the outcome of elections. To determine whether that effect is present despite the absence of racially polarized voting, the NYVRA requires a totality-of-the-circumstances inquiry. *Id.* § 17-206(2)(b)(i)(B), (ii)(B).[2] Under either evidentiary pathway, the analysis ultimately looks to whether the challenged at-large election system is causing racially discriminatory effects.

The Town mischaracterizes the NYVRA's vote-dilution provision in arguing that it provides a remedy "whenever doing so would give citizens

---

[2] When a political subdivision uses a district-based or alternative method of election, the NYVRA requires the *additional* showing "that candidates or electoral choices preferred by members of the protected class would usually be defeated." Election Law § 17-206(2)(b)(ii).

statutorily lumped together by race a greater opportunity to elect more candidates of their choice." Town's Br. at 2. *First*, as explained above (see *supra* at 9-10), the statute provides a remedy only when plaintiffs can prove that the challenged electoral practice or system has a racially discriminatory disparate impact on members of a protected class. *See* Election Law § 17-206(2). And where racially discriminatory vote dilution is proven, an appropriate remedy is provided to ensure only that members of the protected class at issue have an *equal* opportunity to participate in the political process—not a *greater* opportunity than members of other racial groups. *See id.* § 17-206(2)(a), (5)(a).

Second, the Town's argument that the NYVRA requires voters to be "statutorily lumped together by race" (at 2, 17, 33) is misleading. To the extent "lumping" is meant to highlight that analyzing NYVRA vote-dilution claims often involves comparing how the challenged system or practice affects members of different racial groups, all laws that address racial discrimination involve such considerations or concern with race, *see Raso v. Lago*, 135 F.3d 11, 16 (1st Cir. 1998). For example, a race-based employment-discrimination claim under the State or City Human Rights Law typically requires either direct evidence of racial animus or

comparisons with similarly situated persons of a different race. *See, e.g.*, *Ellison v. Chartis Claims, Inc.*, 178 A.D.3d 665, 669 (2d Dep't 2019). And disparate impact claims routinely involve grouping (or "lumping" in the Town's view) together individuals of the same race to determine whether a policy or practice adversely affects members of that race. *See, e.g.*, *Mandala v. NTT Data, Inc.*, 975 F.3d 202, 210 (2d Cir. 2020) (discussing whether statistical analysis showed "disparity between appropriate comparator groups" for purposes of Title VII claim).

Yet the Town cites not a single case subjecting a race-neutral antidiscrimination statute to strict scrutiny on its face. To the contrary, as explained in the Attorney General's opening brief (at 26-27), courts routinely uphold such statutes without applying strict scrutiny. *See, e.g.*, *Schuette v. Coalition to Defend Affirmative Action*, 572 U.S. 291 (2014); *Higginson v. Becerra*, 786 F. App'x 705 (9th Cir. 2019), *cert. denied*, 140 S. Ct. 2807 (2020); *Rothe Dev., Inc. v. United States Department of Def.*, 836 F.3d 57, 72 (D.C. Cir. 2016); *Cohen v. Brown Univ.*, 101 F.3d 155, 170-72 (1st Cir. 1996); *Sanchez*, 145 Cal. App. 4th 660; *Portugal*, 1 Wash. 3d 629. The reasoning in those cases applies here too: A statute that equally protects members of all races from racial discrimination does not

treat people differently based on race merely because analyzing whether discrimination occurred in a particular case involves looking at the effects of a challenged practice on the members of different racial groups.

Third, to the extent the Town's reference to "lumping" voters together by race refers to analyzing voting patterns to determine if they are racially polarized, the Town's argument misses the mark. Voters are free to vote in a way that differs from other members of their racial group, and neither a voter's race nor their electoral choices are reflected in their voter registration records. Thus, a racially-polarized-voting analysis merely compares demographic data with election results to determine whether there is a correlation between race and electoral preferences. Recognizing this correlation where it already exists in fact is not tantamount to lumping voters together by race and treating them differently based on race. In any event, the Town's arguments about the racially-polarized-voting prong of the vote-dilution provision cannot support its facial attack because vote dilution may also be proven through the totality-of-the-circumstances prong. That prong relies on a fact-intensive analysis that does not "statutorily lump" voters together by race.

B. The NYVRA Does Not Trigger Strict Scrutiny Merely by Providing a Race-Neutral Remedy for Racial Discrimination.

As the Attorney General's opening brief explains (at 31-37), the remedies authorized by the NYVRA are race neutral; they do not inherently favor only certain racial groups. And the Town's core argument (at 30-32)—that the NYVRA triggers strict scrutiny merely because it requires political subdivisions to use race-neutral means to remedy racial discrimination—flies in the face of controlling precedent.

It is undisputed that the remedies authorized by the NYVRA to address vote dilution are themselves facially race-neutral. If a court finds vote dilution in an action brought under the NYVRA, then it must "implement appropriate remedies to ensure that voters of race, color, and language-minority groups have equitable access to fully participate in the electoral process." Election Law § 17-206(5)(a). The statute lists numerous potential remedies, none of which requires political subdivisions to classify their voters based on race. As the trial court in *Coads* explained: "None of the potential remedies provided in the NYVRA require a political subdivision to use race as the sole or predominant factor in

determining which remedy is appropriate or in fashioning any remedy. Race is not even mentioned." *Coads*, Slip Op. at 19.

Indeed, the Town *concedes* that the statute's remedies—including district-based elections, alternative methods of elections, and new or revised redistricting plans—are not facially discriminatory. Town's Br. at 31. This concession is fatal to the Town's facial challenge. Given the capacity limitations discussed above, the Town can challenge the NYVRA only insofar as compliance with the statute would cause it to violate the constitutional rights of its voters in every conceivable application. If the NYVRA requires a political subdivision to implement a facially race-neutral remedy—as the Town itself concedes—then voters have no plausible claim that such a remedy constitutes an express racial classification. Nor does the Town have any plausible claim that its implementation of such a race-neutral remedy will necessarily require it to classify its voters based on race.

The Town also cites no authority for the proposition that a race-neutral change in law triggers strict scrutiny merely because it is intended to mitigate the racially discriminatory effects of an existing system or practice. To the contrary, the Supreme Court has expressly

held that political subdivisions may use "race-neutral tools" to remedy the disparate impact of government policies. *Texas Dept. of Hous. & Community Affairs*, 576 U.S. at 545. "[M]ere awareness of race in attempting" to address that disparate impact "does not doom that endeavor at the outset." *Id.* Likewise, the Second Circuit has held that a change in law or policy motivated by an effort to "lessen the discriminatory impact" of the previous law or policy does not create an express racial classification. *Hayden v. County of Nassau*, 180 F.3d 42, 50 (2d Cir. 1999). Put simply, the use of remedies that the Town concedes are race-neutral to address instances where an at-large election system (or other electoral practice) has been proven to have racially discriminatory effects does not constitute invidious racial discrimination.

The amicus brief filed by Mount Pleasant fares no better. Mount Pleasant argues (at 13) that the NYVRA's vote-dilution provision differs from most race-neutral antidiscrimination statutes because the NYVRA "*require[s]* state action on the basis of protected categories" rather than merely forbidding "regulated persons from taking action on the basis of a protected category." But where a challenged practice is proven to have a discriminatory disparate impact on members of a protected class, many

antidiscrimination statutes authorize as a remedy an order requiring the defendant to engage in some action for the benefit of the plaintiffs who were members of the protected class. *See, e.g.*, 42 U.S.C. § 2000e-5(g)(1) (Title VII provision authorizing court to "order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, . . . or any other equitable relief as the court deems appropriate"); 42 U.S.C. § 3613(c)(1) (Fair Housing Act provision authorizing court to "order[] such affirmative action as may be appropriate"). And such remedies may, and routinely have been, required where the defendant is a state or municipal entity. *See Hayden*, 180 F.3d at 46 (discussing consent decree under Title VII ordering Nassau County to "develop an examination which would eliminate, or at least significantly reduce, the discriminatory impact on minority and female candidates"); *United States v. City of New York*, 717 F.3d 72, 97 (2d Cir. 2013) (holding that district court properly ordered "significant affirmative relief" against New York City to remedy disparate-impact violation under Title VII).

For example, when a court orders an employer to alter its hiring practices because those practices have a demonstrated disparate impact on a protected class, the goal is to benefit members of that protected class.

See Hayden, 180 F.3d at 46; *City of New York*, 717 F.3d at 96-97. And the employer necessarily considers race in carrying out changes to its practices. But neither the Town nor Mount Pleasant cites any case holding that such a defendant's use of a race-neutral remedy is subject to strict scrutiny on the basis that it is an express racial classification within the meaning of equal protection jurisprudence. To the contrary, courts have held that a race-neutral "enforcement measure taken under [an antidiscrimination] statute" is not "automatically 'suspect' under the Equal Protection Clause." *Raso*, 135 F.3d at 16. And the Washington Supreme Court, in upholding that State's voting rights act against a facial equal protection challenge, explicitly rejected the argument that the act created an express racial classification merely by "recognizing the existence of race, color, and language minority groups and prohibiting discrimination on that basis." *Portugal*, 1 Wash. 3d at 648.

In sum, nothing in the text of the NYVRA requires political subdivisions to engage in invidious racial discrimination. The NYVRA equally protects all voters from racially discriminatory vote dilution and contemplates race-neutral means to remedy such discrimination. Because the law "neither says nor implies that persons are to be treated

differently on account of their race," it does "not embody a racial classification." *Crawford v. Board of Educ.*, 458 U.S. 527, 537 (1982).

C. The NYVRA's Vote-Dilution Provision Is Not Akin to an Affirmative Action Policy.

The Town errs in relying on affirmative action case law, including the Supreme Court's recent decision in *Students for Fair Admissions, Inc. v. President and Fellows of Harvard College* ("*SFFA*"), 600 U.S. 181 (2023). The NYVRA is not akin to the affirmative action policies at issue in *SFFA* because, unlike those policies, the NYVRA's protections are available to members of all racial groups.

The affirmative action policies at issue in *SFFA* (and in similar cases) were subject to strict scrutiny because they distributed benefits to members of only certain racial groups. *See, e.g.*, *SFFA*, 600 U.S. at 209-10. For example, in *SFFA*, in deciding which students to admit into university, race served as a "plus" factor for members of only certain racial minority groups. *See id.* Such affirmative action policies have long been subject to strict scrutiny, *see, e.g.*, *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200 (1995), and the Supreme Court's decision in *SFFA* did not change the law in this respect. Indeed, the *SFFA* decision was a

"landmark holding" (Town's Br. at 37), only insofar as the Court held that the university affirmative action policies at issue could not satisfy strict scrutiny. The decision has no bearing on whether a race-neutral antidiscrimination statute like the NYVRA, which protects *all* voters from racially discriminatory vote dilution, is subject to strict scrutiny in the first place.

Unlike affirmative action, the NYVRA is not subject to strict scrutiny because it does not give members of only certain racial groups a protection or advantage. *See Coads*, Slip Op. at 17 (NYVRA is not analogous to affirmative action because NYVRA "does not identify any race upon which any preference is conferred"); *see also Robinson v. Ardoin*, 86 F.4th 574, 593 (5th Cir. 2023) (rejecting comparison between voting redistricting and affirmative action); *Singleton v. Allen*, 690 F. Supp. 3d 1226, 1317 (N.D. Ala. 2023) (same). Rather, the NYVRA ensures equality of opportunity for members of all racial groups by protecting them from election systems or practices that have racially discriminatory effects. *See* Election Law § 17-206(2)(a), (5)(a). That equality of opportunity does not give a favored racial group disproportionately greater political power. Because the NYVRA merely mitigates the racially discriminatory

disparate impacts of existing methods of election, and equally protects members of all racial groups from such disparate impacts, it is nothing like the affirmative action policies struck down in *SFFA*.

D. Section 2 of the Federal Voting Rights Act Does Not Trigger Strict Scrutiny on Its Face.

The Town's reliance on federal case law applying the federal VRA is also unavailing. Contrary to the Town's argument (at 35-36), Section 2 of the federal VRA is not subject to strict scrutiny on its face. And a government's conduct in compliance with Section 2 does not automatically invoke strict scrutiny. So too with the NYVRA's vote-dilution provision.

The case on which the Town principally relies—*Abbott v. Perez*, 585 U.S. 579 (2018)—did not hold that Section 2 is always subject to strict scrutiny. Rather, *Abbott* discussed the relationship between Section 2, which in certain respects requires governments to *consider* race in drawing electoral district lines in order to ensure that the right to vote has not been "deni[ed] or abridge[d] . . . on account of race or color," 52 U.S.C. § 10301(a), and the Equal Protection Clause, which "pulls in the opposite direction" insofar as it *limits* the manner in which governments

may consider race. *Abbott*, 585 U.S. at 585-87. Specifically, to remedy a Section 2 violation, governments may be required to consider race in redrawing certain electoral district lines. *See Allen v. Milligan*, 599 U.S. 1, 30 (2023). But under the Equal Protection Clause, racial considerations generally may not predominate over race-neutral criteria (for example, compactness and contiguity) in drawing electoral districts. *See Alexander v. South Carolina State Conf. of the NAACP*, 144 S. Ct. 1221, 1233-34 (2024).

The portions of the *Abbott* decision on which the Town relies addressed the specific situation where a government drawing electoral districts faced these potentially "competing hazards of liability." 585 U.S. at 585-87. In particular, the Court addressed whether Texas engaged in impermissible racial gerrymandering by drawing certain electoral districts where racial considerations predominated. *Id.* at 591-93. It was this alleged racial gerrymandering that triggered strict scrutiny under the Equal Protection Clause. *Id.* at 620-21. And it was in this particular context of defending against alleged racial gerrymandering in electoral district lines that the Supreme Court explained that it has assumed that a government may invoke its effort to comply with Section 2 as a valid

justification for its consideration of race in drawing electoral districts. *Id.* at 587. As the Court explained, "to harmonize these conflicting demands" of the Equal Protection Clause and Section 2, it has "assumed that complying with the VRA" is a compelling government interest and that "consideration of race in making a districting decision is narrowly tailored and thus satisfies strict scrutiny if the State has 'good reasons' for believing that its decision is necessary in order to comply with the VRA."[3] *Id.* at 587 (quotation marks omitted).

Nothing about this assumption implies that Section 2 *on its face* always triggers strict scrutiny, or that a government's compliance with Section 2 always triggers strict scrutiny. Nor does the Town cite any case which subjected Section 2 to strict scrutiny on its face. Indeed, we are aware of only two courts that have ever directly addressed the argument that Section 2 always triggers strict scrutiny, and both rejected it. *Sanchez*, 145 Cal. App. 4th at 681-82; *Coads*, Slip Op. at 15 ("Section 2 of the VRA has not been . . . required to pass strict scrutiny."). And courts

[3] The cases cited by *Abbott* both involved racial gerrymandering claims of this type, where racial considerations allegedly predominated in redistricting. *See Bethune–Hill v. Virginia State Bd. of Elections*, 580 U.S. 178, 181-82 (2017); *Shaw v. Hunt*, 517 U.S. 899, 904-05 (1996).

routinely adjudicate Section 2 claims without any discussion, let alone application, of strict scrutiny. *See, e.g.*, *Alpha Phi Alpha Fraternity Inc. v. Raffensperger*, 700 F. Supp. 3d 1136 (N.D. Ga. 2023) (Section 2 violation found after bench trial, and Section 2 held to be constitutional, without any discussion of strict scrutiny); *Luna v. County of Kern*, 291 F. Supp. 3d 1088 (E.D. Cal. 2018) (Section 2 violation found after bench trial, without any discussion of strict scrutiny); *Missouri State Conf. of NAACP v. Ferguson-Florissant Sch. Dist.*, 201 F. Supp. 3d 1006 (E.D. Mo. 2016) (same), *aff'd*, 894 F.3d 924 (8th Cir. 2018). In short, Section 2 of the federal VRA is not subject to strict scrutiny on its face, and a government's conduct to comply with Section 2 does not automatically invoke strict scrutiny. Redistricting pursuant to Section 2 is subject to strict scrutiny only when racial considerations predominate.

Thus, the only lesson to be drawn from the federal Section 2 jurisprudence on which the Town relies is that one specific application of the NYVRA's vote-dilution provision may trigger strict scrutiny in particular cases. Specifically, strict scrutiny might be triggered when a political subdivision is alleged to have allowed racial considerations to predominate in the drawing of electoral district lines and claims that it

did so to remedy or avoid a NYVRA violation. Although that is one conceivable application of the statute, it is not *every* conceivable application of the statute. Indeed, as explained above and as the Town concedes (see *supra* Point II.B), the statute explicitly contemplates a broad range of facially race-neutral remedies—many of which do not involve drawing electoral districts at all. And at this stage of the litigation, the Town has not been found to have engaged in vote dilution or ordered to implement any remedy for such vote dilution—let alone to draw district lines with racial considerations as the predominant factor. The statute cannot be struck down on its face merely because one hypothetical future application of the statute may trigger strict scrutiny.

* * *

For the foregoing reasons, Supreme Court erroneously held that strict scrutiny applied to this facial challenge to the NYVRA. The statute on its face is subject only to rational basis review. The statute readily satisfies that standard, and the Town does not argue otherwise. Thus, this Court should hold that the NYVRA comports with the Equal Protection Clauses of the Federal and State Constitutions.

POINT III

EVEN IF STRICT SCRUTINY APPLIES, DEFENDANTS' FACIAL CHALLENGE TO THE VOTE-DILUTION PROVISION FAILS

Even if this Court holds that the NYVRA's vote-dilution provision is subject to strict scrutiny, the Town's facial challenge to the provision fails because the Town has not shown that every possible application of the vote-dilution provision fails strict scrutiny.

As explained above (see *supra* at 4), the Town bears "the substantial burden of demonstrating that in any degree and in every conceivable application," the NYVRA's vote-dilution provision "suffers wholesale constitutional impairment." *Matter of Moran Towing*, 99 N.Y.2d at 448 (quotation marks omitted). The Town recognizes (at 37-38) that the NYVRA's vote-dilution provision would satisfy strict scrutiny if it were narrowly tailored to achieve a compelling state interest. The Town further concedes that remediating past discrimination is a compelling state interest. *See SFFA*, 600 U.S. at 207. And the Town concedes (at 47-48) that evidence of past discrimination may be used in proving a vote-dilution claim under the NYVRA based on the totality of the circumstances. *See* Election Law § 17-206(3)(a). These concessions are fatal to the Town's facial challenge: If the NYVRA's vote-dilution

provision may be applied to remedy past discrimination, which is a compelling interest under Supreme Court precedent, then there are narrowly tailored applications of the statute that could satisfy strict scrutiny.

Although the Town argues that the NYVRA's vote-dilution provision is not narrowly tailored because it differs from Section 2 of the federal VRA in certain respects, these differences are not fatal to the NYVRA. As the Attorney General explained in her opening brief (at 42), these differences reflect policy choices that the State may legitimately make in the exercise of its "broad powers to determine the conditions under which the right of suffrage may be exercised." *Shelby County*, 570 U.S. at 543. There is no merit to the notion that a state voting rights statute is not narrowly tailored because it is insufficiently "comparable" (Town's Br. at 51), to the federal VRA.[4] *See Sanchez*, 145 Cal. App. 4th at

[4] The Town's reliance (at 40, 50) on *Bartlett v. Strickland*, 556 U.S. 1 (2009), is unavailing. *Bartlett* merely held that interpreting Section 2 "to require crossover districts . . . would unnecessarily infuse race into virtually every redistricting, raising serious constitutional questions." 556 U.S. at 21 (quotation marks omitted). The constitutionality of requiring crossover districts is not a question presented here. Nor does it have any bearing on the Town's *facial* challenge.

687-88 (explaining that differences between the California Voting Rights Act and the federal VRA "do not automatically render [California's statute] unconstitutional"). Beyond the misplaced reliance on these differences between the state and federal laws, the Town fails to explain why no conceivable application of NYVRA's vote-dilution provision may be narrowly tailored to remedy past discrimination.

Accordingly, the Town has not met its burden of showing that the NYVRA's vote-dilution provision fails strict scrutiny in every possible application. Therefore, the Town's facial challenge to the vote-dilution provision should be rejected. And as the Attorney General's opening brief explained (at 50-53), the plaintiffs here raised triable issues of fact about historical and current discriminatory conditions in the Town, among other issues. Granting summary judgment to the Town was thus improper.

POINT IV

IT IS UNDISPUTED THAT SUPREME COURT IMPROPERLY ORDERED RELIEF NOT SOUGHT BY ANY PARTY

As explained in the Attorney General's opening brief (at 54-57), Supreme Court improperly purported to strike down the NYVRA "in its entirety," including sections of the statute that were not at issue. (Order at 25.) And Supreme Court improperly purported to prohibit "further enforcement and application" of the statute to the Town as well as "any other political subdivision in the State of New York," none of which was actually a party before the court. (*Id*.) The Town concedes (at 4 n.1) that in the trial court, it challenged the constitutionality of only the NYVRA's vote-dilution provision, Election Law § 17-206(2)(b)(i), and not any other provision of the statute. The Town further concedes (at 10) that, as relief, it sought nothing more than a grant of summary judgment in its favor, "and did not ask for the much broader relief that the Supreme Court ultimately issued." Thus, there is no dispute that, even if the Court affirms the grant of summary judgment dismissing plaintiffs' claims here, the Court should modify the order to grant summary judgment to the Town and dismiss plaintiffs' complaint, without providing any additional relief.

CONCLUSION

The Court should reverse the judgment below and reject the Town's facial challenge to the NYVRA.

Dated: Albany, New York
December 9, 2024

Respectfully submitted,

LETITIA JAMES
Attorney General
State of New York
Intervenor

By: */s/ Beezly J. Kiernan*
BEEZLY J. KIERNAN
Assistant Solicitor General

The Capitol
Albany, New York 12224
(518) 776-2023
Beezly.Kiernan@ag.ny.gov

BARBARA D. UNDERWOOD
Solicitor General
JUDITH VALE
Deputy Solicitor General
ANDREA TRENTO
BEEZLY KIERNAN
Assistant Solicitors General
SANDRA PARK
Bureau Chief, Civil Rights
LINDSAY MCKENZIE
Section Chief, Civil Rights
DEREK BORCHARDT
Assistant Attorney General
of Counsel

PRINTING SPECIFICATIONS STATEMENT

Pursuant to the Uniform Practice Rules of the Appellate Division (22 N.Y.C.R.R.) § 1250.8(j), the foregoing brief was prepared on a computer (on a word processor). A proportionally spaced, serif typeface was used, as follows:

Typeface: Century Schoolbook
Point size: 14
Line spacing: Double

The total number of words in the brief, inclusive of point headings and footnotes and exclusive of pages containing the table of contents, table of citations, proof of service, certificate of compliance, or any authorized addendum containing statutes, rules, regulations, etc., is 6,796.